Docket No. 82-95

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In the Supreme Court of the United States

OCTOBER TERM 1982

NORDASILLA CORPORATION
Petitioner,

v.

NORFOLK SHIPBUILDING &
DRYDOCK CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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NORDASILLA CORPORATION,
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ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Norfolk Shipbuilding & Drydock Corporation, respectfully requests the Court deny the Petition for a Writ of Certiorari seeking review of the Fourth Circuit's decision in this case. The opinion below is reproduced at Petition, 1a, et seq.

STATEMENT OF THE CASE

After the fire of February 3, 1977, Petitioner's yacht ALISSA was extensively rebuilt by Respondent, at no cost to Petitioner except for items agreed to be unrelated to the fire. There was no allowance made for depreciation, and Petitioner received back a rebuilt, refurbished yacht, new for old.

Mr. and Mrs. Armstrong, majority stockholders of Petitioner, testified that if the ALISSA had not been detained at Norshipco for the fire repairs, they would have made a voyage to Alaska, returning through the Caribbean to Europe to sell the vessel (7a). However, during the years between redelivery at Norshipco in the spring of 1978 and March 1, 1982, according to trial testimony and, Petitioner's Reply Brief below, the postponed voyage was never taken either on a substitute vessel or after the ALISSA was available.

Nordasilla Corporation "has never been and apparently was never intended to be a profit-making company or a "business" in the ordinary sense of the word." (7a).[1] "It was never intended by the Armstrongs

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[1] Page references are to Petitioner's Appendix.

or the plaintiff to charter the vessel or to derive income from her in any way other than ultimate resale." (7a). The yacht ALISSA ". . . . had no history of income and which was never intended to be used for anything other than the pleasure of its owner's shareholders." (28a).

The District Court found upon the facts of this case that there could be no recovery for loss of use based upon The CONQUEROR, 166 U.S. 110 (1897) and Thomson v. United States, 266 F.2d 852 (4th Cir. 1959). The District Court also rejected Petitioner's proof of damages which were based upon charter rates, even assuming loss of use damages had been recoverable in this case:

> Plaintiff urges the net charter rate as a measure of damages. However, this measure would assume or require proof of a vessel in top operating condition and would require detailed proof of rates and expenses and likely charters to arrive at a fair net. Such a measure could be unfair to the extent it might result in application of a lucrative charter rate to a vessel which was never chartered, which could not legally be chartered and concerning which charter was not only never contemplated but was expressly declined. (31a, footnote 10).

At the Court of Appeals, Petitioner advanced three arguments:

1. The CONQUEROR has been misinterpreted by the District Court in this case and by the Fourth Circuit in Thomson, or:

2. There are sufficient factual differences between The CONQUEROR and NORDASILLA which distinguish the two, or:

3. The law of The CONQUEROR is long overdue for re-examination and change.

In its Petition filed herein, Petitioner has abandoned points 2 and 3, apparently accepting the determinations below that The CONQUEROR remains the law of the land and is factually indistinguishable from our case.

At the Court of Appeals, Petitioner also adopted a new theory of damages based upon application of an arbitrary interest rate, not submitted at the District Court, to the alleged value of the ALISSA for the period of detention.

The Court of Appeals affirmed, per curiam, refusing to distinguish this case from The CONQUEROR and Thomson.

ARGUMENT

1. THE DISTRICT COURT AND THE FOURTH CIRCUIT CORRECTLY INTERPRETED THE CONQUEROR IN HOLDING THAT NORDASILLA CORPORATION COULD NOT RECOVER LOSS OF USE DAMAGES FOR THE DETENTION OF ALISSA AT NORSHIPCO FOR FIRE REPAIRS.

Neither the District Court nor Court of Appeals, nor, of course, The CONQUEROR has stated that there can never be recovery for loss of use of a yacht. Although the charterer of a yacht may use the yacht solely for pleasure, detention of such a yacht which deprives the owner of charter hire would apparently result in demurrage damages under The CONQUEROR:

> It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure. . . . In other words, there must be a loss of profits in its commercial sense. In all the cases in which we have allowed demurrage the vessel has been engaged, or was capable of being engaged in a

> profitable commerce, and the amount allowed was determined either by the charter value of such vessel, or by her actual earnings at about the time of the collision. The Conqueror, however, did not belong to the class of vessels which are engaged in commercial pursuits, or are ordinarily let to hire. There is doubtless a class of pleasure boats that are let for excursions, and become a source of pecuniary profit to their owners; but the Conqueror did not belong to that class. She was purchased by her owner for his personal pleasure, and there is not an atom of testimony tending to show that he bought her for hire, or would have leased her if he had been able to do so. . . . 166 U.S. at 133.

The Supreme Court set forth in The CONQUEROR a two part test for permitting recovery of demurrage (loss of use):

> It is equally well settled, however, that demurrage will only be allowed when [1] profits have actually been, or may be reasonably supposed to have been, lost, and [2] the amount of such profits is proved with reasonable certainty. 166 U.S. at 125.

The Supreme Court was apparently reviewing a somewhat sparse record on the question of damages. The question of demurrage damages was not addressed in the District Court opinion, 49 Fed. 99 (S.D.N.Y. 1892), and the Court of Appeals affirmed the District Court and a commissioner's decree for damages, without an

opinion. In reversing the $15,000 demurrage damages granted by the commissioner, the Supreme Court found that the yacht owner failed both tests for demurrage, either of which failures precluded recovery.

The present case is virtually identical. The only significant difference is that the loss of recreation or deferred enjoyment was not in this case even suffered by Petitioner, but rather by two of Petitioner's stockholders who are not parties to the litigation. Petitioner admits, as the District Court found, that there was never any intention of employing ALISSA in the charter trade, or in any way to use her for profit. (7a). Moreover, ALISSA could not legally have been chartered, and all inquiries along those lines had been declined. (32a). Clearly, and as the courts below have found, Petitioner failed the first test set forth in The CONQUEROR. This failure alone was sufficient to preclude any loss of use recovery according to The CONQUEROR, Thomson and the courts below in this case.

While the District Court decided the case solely on the first test, it also demonstrated in dicta

Petitioner's failure of the second test. Just as in The CONQUEROR, Petitioner below attempted to prove damages via testimony of charter rates for other vessels. However, the District Court demonstrated the unacceptability of this proof due to lack of evidence of a vessel (ALISSA) in top operating condition, lack of detailed proof of rates, expenses and likely charters. Moreover, even if such proof had been submitted, charter rates would be an unfair measure of damages because ALISSA was never chartered and could not legally be chartered. (32a). The same insufficient charter evidence was discarded by the Supreme Court in finding that there was a failure of the second test in The CONQUEROR — the amount of damages.

While the District Court in dicta and plaintiff at the Fourth Circuit discussed alternate theories of damages, such alternate theories were not advanced at trial, and, it is submitted, may not therefore be pursued. In United States v. One 1971 Mercedes Benz 2-Door Coupe, 542 F.2d 912 (4th Cir. 1976), the Fourth Circuit responded to a similar attempt:

> The owner's remedy, if any, on the issue of valuation must be presented to the

> District Court. Questions not raised and properly presented in the trial forum will not be noticed on appeal, in the absence of exceptional circumstances. Id. at 915.

Petitioner below chose to meet test two (quantification of damages) with evidence on charter rates. It chose to rise or fall on charter rates, just as was the case in The CONQUEROR. In both cases the vessel owner failed in its proof, and that failure alone is sufficient to preclude recovery.

2. THERE IS NO CONFLICT BETWEEN THIS DECISION AND ANY SUPREME COURT DECISION OR ANY COURT OF APPEALS DECISION.

In alleging the contrary Petitioner cites one Supreme Court case, Brooklyn Eastern District Terminal v. United States, 287 U.S. 170 (1932) and one Court of Appeals case, The EROS, 251 F. 45 (2d Cir. 1918).

While Petitioner spends much time arguing and quoting dicta from Brooklyn, the critical points are glossed over:

1. Brooklyn involved loss of use of a commercial tugboat, not a yacht.

2. Brooklyn disallowed the demurrage claim.

It is a measure of the lack of precedent available to Petitioner that it must rely heavily on a case involving a commercial vessel, and which case had the opposite result on demurrage from that which Petitioner seeks here. Considering the dicta cited by Petitioner, it appears that there was an error in reading The CONQUEROR. In Brooklyn it is stated that the CONQUEROR would not have been used during the period of detention. 287 U.S. at p. 175. In fact the statement was:

> . . . . During more than one-half the time for which demurrage was allowed she [CONQUEROR] probably would have been laid up at her wharf. 166 U.S. at p. 134.

Therefore, the owner of the CONQUEROR should have received demurrage, by Petitioner's reasoning, for at least that half of the detention time she would have been used for her owner's pleasure, but the Supreme Court found he was due no demurrage.

Petitioner does not allege that The EROS decision is in conflict with the present case, only that a District Court case may so allege. In fact, The EROS is not in conflict with The CONQUEROR, nor Thomson,

nor the present case. The EROS was a yacht chartered for hire. While the charterer's use of the vessel was to have been a pleasure cruise, the fact remains that the transaction was a commercial venture with a written contract and a specific sum of money changing hands. When the owner breached the contract (charter party), the Court computed damages based on the difference in charter rates between the EROS and the substitute vessel actually hired. The EROS was a vessel of that:

> . . . . class of pleasure boats that are let for excursions, and become a source of pecuniary profit for their owners; but the CONQUEROR did not belong to that class. 166 U.S. at p. 133

Nor did the ALISSA belong to that class. There is no conflict with The EROS.

3. ALL OF THE COURTS OF APPEAL CONSIDERING THE CONQUEROR HAVE AGREED IT IS STILL GOOD LAW AND HAVE INTERPRETED IT AS THE COURTS IN THIS CASE HAVE.

Since Petitioner is not advocating here a reversal of The CONQUEROR as it advocated at the Court of Appeals, there is no need to discuss cases such as Mitsui O.S.K. Lines, K.K. v. Horton & Horton, Inc., 480 F.2d 1105 (5th Cir. 1973) and Mid American

Transportation Co. v. Cargo Carriers, Inc., 480 F.2d 1071 (8th Cir. 1973), which cite The CONQUEROR as continuing to be good law on the question of demurrage. However, there are three decisions from various Courts of Appeal which demonstrate that the decision in this case by the District Court and the Court of Appeals correctly interpreted and relied upon The CONQUEROR:

1. Thomson v. United States, 266 F.2d 852 (4th Cir. 1959).

2. Snavely v. Lang, 592 F.2d 296 (6th Cir. 1979).

3. Oppen v. Aetna Insurance Company, 485 F.2d 252 (9th Cir. 1973).

In responding to these cases below Petitioner discarded Thomson as being a bad decision and attempted to distinguish the other two. Considering the language in those two cases, it is a difficult task. Both cases involved an alleged loss of use of private, pleasure vessels, and in both cases money damages were refused, citing The CONQUEROR.

> The seminal case in the area of damages for loss of use is The CONQUEROR. . .

> . The CONQUEROR has been interpreted as creating an ironclad rule that under federal maritime law demurrage is not an allowable item of damages for loss of use of a private pleasure craft. Snavely, supra, at p. 298.
>
> [and]
>
> The loss of one summer season [192 days] of occasional yachting is an inconvenience, but cannot be considered a deprivation sufficient to justify a substantial award of damages. There is no way to tell how often the yacht would have been used, nor to estimate the value of recreation deferred for a period of time. . . . While the court is sympathetic to any loss of time spent together by a family, an award of damage for such a loss opens the courts to imagination and speculation in evaluation of damages. It is precisely these types of claims for damages which render too "highly speculative and immeasurable" an award for demurrage in the case of a vessel used purely for recreation. Id. at pp. 299-300.

Oppen says the same thing more concisely:

> Under federal maritime law loss of use of a private pleasure boat is not a compensable item of damages. Id. at p. 257.

In both cases the yacht owners alleged that Brooklyn had altered or limited the law as set forth in The CONQUEROR. The Sixth and Ninth Circuits responded as follows:

> The cited language in Brooklyn (287 U.S. at 175, 53 S.Ct. 103) was dictum. In our view it takes a new and contrary holding of the Supreme Court before we are relieved of our obligation to follow previous holdings of that court. Oppen at p. 257, footnote 12.
>
> [and]
>
> While appreciative of the reasoning in Brooklyn Eastern District Terminal, and with great deference to Justice Cardozo, the court is constrained to view The CONQUEROR as retaining its full vitality. Snavely at p. 299.

Clearly, all of the Courts of Appeal entertaining this question are in agreement with the decision below.

4. THE DISTRICT COURT AND STATE COURT DECISIONS CITED BY PETITIONER GIVE NO BASIS FOR A REVIEW OF THIS CASE BY THE SUPREME COURT.

Failing to find Supreme Court precedent in its favor, and there being no dispute among the Courts of Appeal, Petitioner attempts to bootstrap his case with a few scattered District Court cases and four State Court automobile decisions. The following brief comments are offered with respect to the cited cases, each of which is distinguishable factually and/or legally from this case.

1. The Lagonda, 44 F. 367 (E.D.N.Y. 1890) — decided prior to The CONQUEROR.

2. The Vanadis, 250 F. 1010 (S.D.N.Y. 1918) — this yacht was apparently a charter vessel since there was a discussion of the charter hire of $13,000 per month offered for her during the 1914 and 1915 seasons.

3. Yachts, Inc. v. The EDWARD F. FARRINGTON, 146 F.Supp. 754 (E.D.N.C. 1956) — "It [the yacht] had been and would have been available for commercial charter during this period but for the collision." at p. 758. Damages were based upon historical earnings and offers for charter during the period of detention.

4. Finkel v. Challenger Marine Corp., 316 F.Supp. 549 (S.D. Fla. 1970) — indicated that The CONQUEROR was no longer good law, and looked to state law for support.

5. English Whipple Sailyard Ltd. v. Yawl Ardent, 459 F.Supp. 866 (W.D. Pa. 1978) — this case was decided solely under Pennsylvania law without any reference to the various admiralty cases such as The CONQUEROR.

It is particularly inappropriate for Petitioner to seek support via analogy to the several state court automobile cases cited. The fire, repairs, detention and litigation in this case all took place in Norfolk, Virginia. Should there be any reason to look to state law for guidance, it would be to the law of Virginia, which states in pertinent part:

> Any person who shall be entitled to recover for damage to or destruction of a motor vehicle shall be entitled to recover, in addition to any other damages to which he may be legally entitled, the reasonable cost which was actually incurred in hiring a comparable substitute vehicle for a period of time during which such person is deprived of the use of his motor vehicle . . . Section 8.01-66 Code of Virginia, 1950, as amended (emphasis added).

Of course no substitute yacht was chartered. Virginia law would have the same result as maritime law in the present fact situation: no recovery for loss of use of ALISSA.

CONCLUSION

Petitioner has now withdrawn its request to have The CONQUEROR decision reversed. All of the Courts of Appeal decisions on point demonstrate that the Courts below in this case have correctly denied the windfall recovery sought herein. There is no basis under Rule 19 of the Rules of the United States

Supreme Court for granting the writ sought. The Petition should be denied.

Respectfully submitted,

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Norfolk Shipbuilding &
Drydock Corporation

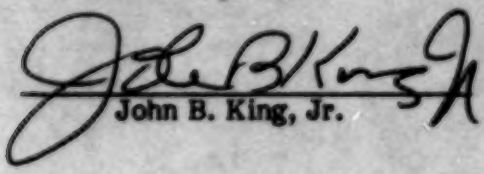
STATEMENT REQUIRED BY RULE 28.1

Respondent, Norfolk Shipbuilding & Drydock Corporation, is a Virginia corporation and is a fifty percent owner of Desert American Insurance Agency, Inc. — Virginia. The remaining fifty percent is owned by Desert American Insurance Agency, Inc., a subsidiary of El Paso Company. Respondent is also eighty percent owner of Marepcon Corporation — International.

CERTIFICATE OF SERVICE

I, John B. King, Jr., certify that on August 16, 1982, forty (40) copies of this BRIEF IN OPPOSITION were mailed or delivered to the Clerk, United States Supreme Court and three (3) copies were mailed to:

Counsel for Petitioner,
Nordasilla Corporation



John B. King, Jr.